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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 155

ALBION R. ALLEN, LEE R. ADAMS, ET AL.,
Appellants,

vs.

CITY OF LONG BEACH, A. L. PARMLEY, JOSEPH R. RAMSEY, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IRVING M. SMITH,
City Attorney for
Long Beach, California,
Counsel for Appellees.

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IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

2nd Civil Nos. 17545 and 17544

ALBION R. ALLEN, ET AL.,
Plaintiffs and Appellants,

vs.

CITY OF LONG BEACH, ET AL.,
Defendants and Appellees

LEE R. ADAMS, ET AL.,
Plaintiffs and Appellants,

vs.

CITY OF LONG BEACH, ET AL.,
Defendants and Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellees in the above-entitled cause for their joint statement in opposition to appellants' statement as to

jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I

Statement of Issues on Appeal

The questions sought to be presented on this attempted appeal are whether (1) a pension system, created by provisions of the Charter of the City of Long Beach, in favor of certain employees of the Police and Fire Departments of the City of Long Beach, can lawfully be amended and modified by repealing the provisions thereof pertaining to the right of certain of said employees to earn a pension in excess of 50% of the salary attached to the rank or position held by said employees one year prior to the date of their retirement without impairing a contractual right in contravention of the Constitution of the United States; (2) the District Court of Appeal of the State of California erred in its opinion when it stated that the electorate of the City of Long Beach in adopting Section 187.1 intended to modify the rights granted to the appellants under Section 187 of the Charter; and (3) certain provisional employees who were given appointments to temporary employment for a period not to exceed 150 days prior to the effective date of Section 187.1 of the Charter, obtained pension rights under said Section 187 although said employees did not qualify for permanent employment or receive appointment for permanent employment until a time subsequent to the effective date of said Section 187.1.

Section 187 of the Charter of the City of Long Beach (California Statutes 1925, pp. 1333-37), as amended in 1931 (California Statutes 1931, p. 2785), is attached to appellants' jurisdictional statement herein as Appendix C.

On March 29, 1945, Section 187.1 of the Charter of the City of Long Beach (California Statutes 1945, p. 2954)

became effective, repealing Section 187 of said City Charter. Said section is as follows:

> "Sec. 187.1. Sections 187 and 188 of this Charter are hereby repealed; provided, however, that any member of the Fire or Police Department who shall have served in such department for twenty (20) years or more on the effective date of this amendment shall be entitled to retire at any time within five (5) years from said effective date as provided by subdivision (2) of said Section 187, and, beginning with the date of his retirement, shall be paid a pension of such percentage of his salary as he would have been entitled to receive had he been retired on the effective date of this amendment. This amendment shall take effect sixty (60) days after its approval by the Legislature of the State of California."

The Supreme Court of the State of California had occasion to pass upon the effect of the provisions of Section 187.1 of the Charter of the City of Long Beach in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848. After Section 187.1 became effective the City of Long Beach denied the application of Henry A. Kern for a pension on the ground that Henry A. Kern had not completed twenty years of service on the effective date of Section 187.1 of said City Charter. Kern then filed a petition for a Writ of Mandate in the Supreme Court of the State of California alleging that he had completed twenty years of service and urging that the repeal of Section 187 of the City Charter by the provisions of Section 187.1 could not destroy his right to earn a retirement pension. The Supreme Court of the State of California in said case held that the City could not destroy all pension rights by a repeal of said Charter section and granted Kern a Peremptory Writ of Mandate. The Supreme Court in its decision held that the provisions of said Section 187 form an integral part of

the contract of employment between the City and the employees covered thereby and that said provisions are an indispensable part of that contract, and stated at page 852, "The right to a pension becomes vested upon the acceptance of the employment." The Supreme Court in discussing the nature of pension rights, in the *Kern* case, stated as follows, beginning at page 854:

> "In the leading case of *Pennie* v. *Reis* (1889), 80 Cal. 266 [22 P. 176] (affirmed in 132 U. S. 464 [10 S. Ct. 149, 33 L. Ed. 426]), a death benefit payable to legal representatives was eliminated by the implied repeal of a pension statute, but the repealing statute substituted a more comprehensive pension system which included a death benefit payable to certain dependents. The practical result was a modification which gave the employees more pension benefits than they had before. This case therefore does not stand for the proposition that an employee may be deprived of all pension rights. *Clarke* v. *Reis*, 87 Cal. 543 [25 P. 759], and *Clarke* v. *Police etc. Ins. Board*, 123 Cal. 24 [55 P. 576], were based on the same statute and are distinguishable on the same grounds. (Cf. *Cohrn* v. *Henderson* (1912), 19 Cal. App. 89 [124 P. 1037]; *Burke* v. *Board of Trustees* (1906), 4 Cal. App. 235 [87 P. 421].)
>
> "The kind of modification that has been upheld is illustrated by *Brophy* v. *Employees Retirement System*, 71 Cal. App. 2d 455 [162 P. 2d 939], where the court sustained an amendment, made before the time for retirement, reducing the monthly amount to be paid to retired employees engaged in gainful occupations. It has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence. (*Brooks* v. *Pension Board*, 30 Cal. App. 2d 118 [85 P. 2d 956]; *Sweesy* v. *Los Angeles etc. Retirement Bd.*, 17 Cal. 2d 356 [110 P. 2d

37]; *Home* v. *Souden*, 199 Cal. 508 [250 P. 162]; *Casserly* v. *City of Oakland*, 6 Cal. 2d 64 [56 P. 2d 237]; *Brophy* v. *Employees Retirement System*, 71 Cal App. 2d 455 [162 P. 2d 939]; *McCarthy* v. *City of Oakland*, 60 Cal. App. 2d 546, 550 [141 P. 2d 4]; *Vero* v. *Sacramento City E. R. System*, 41 Cal. App. 2d 482, 486 [107 P. 2d 82].)

"The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.

"Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualifications that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

The claim of appellants is in conflict with the above-quoted portion of the decision of the Supreme Court of the State of California in said *Kern* case. *It is the contention of appellees that the law of reasonable modification became a part of the contract of employment and that any reasonable modification thereafter made is in conformity with the provisions of said contract, and, therefore, not in contravention of the Constitution of the United States.* Appellants do not contend that the modification brought about by

the provisions of Section 187.1 is unreasonable. Said modification in no manner affects the right of appellants to earn a basic pension. The City of Long Beach has merely withdrawn the right formerly given to said employees to earn increased pensions by reason of service beyond the minimum period of service required to qualify for basic pensions.

II

No Substantial Federal Question Is Presented by the Attempted Appeal

The appellees submit that no substantial questions have been raised. The position of the appellants is that any substantial modification of said pension rights is a violation of the Constitution of the United States. The courts of the State of California for many years have held that pension statutes may be modified without violating constitutional provisions. The general rule throughout the United States is that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance in the continuance of which the employee has no vested right, and that such pension is terminable at the will of the public authority.

The Supreme Court of the United States, in the case of *Frisbie* v. *United States,* 39 L. Ed. 657 (157 U.S. 160), stated at page 659:

> "The pension granted by the government is a matter of bounty. *'No pensioner has a vested legal right to his pension.* Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton,* 60 U.S. 19 How. 355 (15:658); *United States* v. *Teller,* 107 U.S. 64, 68 (27:352, 354)." (Italics ours.)

54 A. L. R. 943;
98 A. L. R. 505;

112 A. L. R. 1009;
137 A. L. R. 249.

However, a minority rule has been adopted by some states, one of which is California. Said rule is that once a pension has been granted it cannot be withdrawn by repeal of the pension statute. The Supreme Court of the State of California in the case of *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, enlarged the right of the employee and held that an employee cannot be deprived of all pension rights by subsequent repeal of a pension provision. However, it is well established, under the minority rule, that no vested rights are infringed upon by a modification or amendment of the pension statute if said modification takes effect before the happening of the contingency which entitles the employee to receive a pension.

The foundation for the development of the California Rule arose out of the case of *Pennie* v. *Reis*, 80 Cal. 266, which case was decided in 1889. In this case one Edward A. Ward was a member of the Police Department of the City of San Francisco. In April of 1878, an act of the State legislature became effective which provided, among other things, that the compensation of a police officer should not exceed $102.00 a month and that the Treasurer should retain from the pay of such police officer the sum of $2.00 a month, said sum to be paid into a fund to be known as the Police Life and Health Insurance Fund. The act provided that upon the death of an officer the sum of $1,000.00 would be paid to his legal representative. Ward continued in the employment of the Police Department until the date of his death on March 13, 1889. Nine days prior to his death, and on March 4, 1889, the Act of 1878 was repealed and a new Police Relief and Pension Fund was adopted. The plaintiff administrator of Ward's estate sought to recover the sum of $1,000.00, contending that the repeal of the act could not

deprive Ward's legal heirs of the right to receive the money for the reason that the deceased had a vested property right in the $1,000.00, *and that to divest said heirs of this vested right would be in violation of the Constitutions of the State of California and of the United States.* The court, in ruling against the claim of the administrator, stated:

> "The main contention of petitioner is, that the act is in violation of the provisions of the Constitutions of the United States and of this state, that no person shall be deprived of property without due process of law. This contention goes upon the theory that the deceased had a vested property right in the thousand dollars of public money which the statute had at one time directed to be paid to his legal representative upon the happening of the contingency of his death. Had he died while the law still directed such payment, a different question would have been presented. *He had a mere expectancy which could have none of the elements of a vested right until the contingency contemplated by the statute had happened; but when that event came there was no statute which gave it any significance.* (Italics ours.) A public officer, at least one whose term and compensation are not prescribed by the constitution, has no contract by which he can have or hold either his office or his salary against the legislative will. In *Miller* v. *Kister*, 68 Cal. 144, this court says: 'But it is well settled that salaried public offices created by the legislature are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties, or reduce their salaries.' And such an officer 'accepts the office with the direct understanding that during his term of office the legislature may modify or amend the acts concerning fees of office without impairing any legal right acquired by him by virtue of his election and entry upon the duties of his office.' (*Miner* v. *Solano Co.*, 26 Cal. 118; see also *Attorney-General* v. *Squires*, 14 Cal. 13; *People* v. *Haskell*, 5 Cal. 357.) The said act of March 4, 1889,

therefore, did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner."

The administrator then filed an appeal to the Supreme Court of the United States and the decision is found at 132 U. S. 464, 33 L. Ed., p. 426. The administrator contended before the Supreme Court that because there had been deducted from the salary of Ward the amount provided by statute, Ward had in fact contributed $264.00 to the fund and therefore a repeal could not operate to divest the heirs of the right to receive the money. The Supreme Court, in affirming the decision, stated:

"Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated—the resignation, dismissal or death of the officer—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show that, in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, *the State impaired no absolute right of property in the police officer.* The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. *There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority.* The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously trans-

> ferred and mingled with another fund, and was no longer subject to the provisions of that act. Such being the nature of the intestate's interest in the fund provided by the Law of 1878, *there was no right of property in him of which he or his representative has been deprived.*" (Italics ours.)

The case of *Pennie* v. *Reis*, 132 U. S. 464, 33 L. Ed. 426, was decided by this court in 1889. *In an unbroken line of cases to the present time, the courts of California have consistently held that a pension statute may be modified prior to the happening of the contingency which entitles the employee to retirement without affecting vested rights.* In other words, the law of reasonable modification has become a part of the contract of employment, and therefore, any reasonable modification thereof is in conformity with the contract and does not constitute an impairment of the constitutional contract obligation.

The first case to be decided by the Supreme Court of the State of California following the decision of this court in the case of *Pennie* v. *Reis*, 132 U. S. 464, 33 L. Ed. 426, was that of *Clarke* v. *Reis*, 87 Cal. 543. In this case the Supreme Court of the State of California stated at page 544:

> "The statute under which this right is set up by the plaintiff has received construction from the appellate court of this state in *Pennie* v. *Reis*, 80 Cal. 269, and from the supreme court of the United States in the same case on writ of error. (132 U. S. 471.) These cases hold that a police-officer, such as the assignor of the appellant, *never had any claim on the fund involved here, except upon the happening of certain contingencies, mentioned in the act of the legislature of California* to which we have just adverted, under which act alone could any right have vested in the plaintiff or his assignor." (Italics ours.)

The first case to be decided by the District Court of Appeal involving the modification of pension rights was

that of *Cohrn* v. *Henderson*, 19 Cal. App. 89. In this case the Court stated at page 91:

> "That a law providing pensions for officers and their dependents may be repealed or altered at any time before the happening of the contingency upon which the right to the pension vests is not and cannot be denied. (*Pennie* v. *Reis*, 80 Cal. 266, [22 Pac. 176]; *Pennie* v. *Reis*, 132 U. S. 464, [33 L. Ed. 426, 10 Sup. Ct. Rep. 149].)"

An extensive review of the nature of the vested right of an employee to receive a pension in the State of California is found in the case of *Klench* v. *Board of Pension Fund Commissioners*, 79 Cal. App. 171. This case has been cited with approval by the Supreme Court of the State of California and the various District Courts of Appeal on numerous occasions and in several decisions of these courts have stated that the law announced therein was the law of the State of California in pension matters. The court in discussing the nature of pension rights in the State of California stated at page 183 as follows:

> "In the Pennie case the statute authorizing insurance benefits for the widow or family of police officers was repealed before the death of the officer whose legal successor was attempting enforcement of the claim set up under the repealed statute. In the Clarke case the officer was dismissed from the department before the happening of the contingency upon which, had it happened prior to his dismissal, he would have been entitled to a pension. In the Pennie case it was held, as also it was held by the Supreme Court of the United States to which that case was taken (*Pennie* v. *Reis*, 132 U. S. 464 [33 L. Ed. 426, 10 Sup. Ct. Rep. 149, see, also, Rose's U. S. Notes]), that the police officer concerned therein acquired no vested right in the moneys provided for the payment of police pensions or life

insurance and that no such right could be acquired 'until the event happens upon which the money was to be paid.' It was also so held in the Clarke case. These cases, however, at least inferentially support the view that, when the event or the contingency happens upon which the officer is entitled to receive the money provided for pensioning him as a retired officer, then, in that case, the right to be paid such money becomes and is a vested right. *It is to be conceded, however, that it is within the power of the legislative department of the government, state or local, to repeal, change, or modify a pension law passed for the benefit of its officers or employees,* yet until that is done, and there is a pension system duly established by law, either by direct action of the legislature or by a local political subdivision under its charter, and the conditions or contingency happen upon which an officer or employee of the government becomes eligible to be placed upon the pension rolls and is actually so placed, such officer or employee then acquires a right to be paid the money provided for his relief under such law of which he cannot legally be divested."

"* * * *It is true, of course, as we have before stated, no vested right to a pension is created by the mere act of passing a law providing for pensions for public officers or employees, since, as pointed out, a right to such pension can vest only upon the happening of the contingency or event upon which the right thereto accrues."* (Italics ours.)

In the case of *Carr* v. *Fire Commission,* 30 Cal. App. 2d 208, the District Court of Appeal sustained a modification of a pension system which increased the required service. The court stated at page 211 as follows:

"A pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension."

In the case of *Jordan* v. *Retirement Board,* 35 Cal. App. 2d 653, the court stated at page 656 as follows:

> "It is well established, however, that pension rights do not vest at the time of the enactment of the law, but only upon the happening of the contingency or event upon which the right thereto accrues. (*Klench* v. *Board of Pension Fund Commrs.*, 79 Cal. App. 171 [249 Pac. 46]; *O'Dea* v. *Cook*, 176 Cal. 659 [169 Pac. 366]), and that at any time before the happening of the contingency upon which the right to the pension vests the law granting such right is subject to alteration or repeal."

In the case of *McCarthy* v. *City of Oakland,* 60 Cal. App. 2d 546, the Court in discussing the modification of pension rights stated at page 550 as follows:

> "A pension law may be repealed, changed or modified. All jurisdictions are in accord with this rule, but California with a small minority adheres definitely to the doctrine that when one becomes eligible to be, and is in fact, placed on a pension roll, a vested right accrues of which the pensioner may not be deprived."

In the case of *Brophy* v. *Employees Retirement System,* 71 Cal. App. 2d 455, the District Court of Appeal sustained a modification of the pension statute which reduced the amount of the pension payable to the employee if the employee accepted employment after retirement and the pension payable, plus the salary earned, exceeded the pay fixed for the position held by the employee prior to retirement.

In the case of *Kern* v. *City of Long Beach,* 29 Cal. 2d 848, the Supreme Court of the State of California, in reviewing the effect of modification of pension statutes, stated at page 855 as follows:

> "Thus it appears, when the cases are considered together, that an employee may acquire a vested con-

tractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

The Supreme Court of the State of California, in the case of *Packer* v. *Retirement Board*, 35 Cal. 2d 212, in discussing the effect of modification of pension rights, stated at page 214 as follows:

"The general problem of the power of a governmental body to revise its pension system was recently considered in *Kern* v. *City of Long Beach*, 29 Cal. 2d 848 [179 P. 2d 799], where, as here, the pension law in effect at the time the employee performed his duties contained no express reservation of the right to repeal or modify the existing plan. We there held that a public employee, as a part of his compensation, obtained a vested right to a pension upon entering his duties under such a statute and that the right, once acquired, could not be wholly destroyed by repeal of the pension law prior to time for his retirement. It was recognized, however, that the employee was not entitled to any fixed or definite benefits, but only to a substantial pension, and that the statutory language was subject to the implied qualification that the governing body may make reasonable modifications and changes in the system. (*Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 855 [179 P. 2d 799].) As stated in the *Kern* case: 'The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing

conditions and at the same time maintain the integrity of the system and carry out its beneficent policy.' (29 Cal. 2d at pp. 854-855.)"

In the case of *Palaske* v. *City of Long Beach*, 93 Cal. App. 2d 120, the basic question raised in this attempted appeal was presented to the District Court of Appeal and the Supreme Court of the State of California in a Petition for Hearing. The District Court of Appeal stated at page 133 as follows:

"We are in accord with appellants' contention that since the city had the power to modify the pension plan although it could not repeal it altogether, that section 187.1 should be construed as effective to limit respondent's pension right to 50 per cent of his salary. While the attempted repeal of all rights was void, the provision limiting pension rights is separable therefrom. It appears from the amendment that the electors of the city intended to reduce the liability for pensions created under section 187 to the extent of their power constitutionally to do so, and intended to preserve pension rights only to those who were eligible for retirement on the effective date. Although they could not deprive respondent and others similarly situated of all pension rights, they had the power to modify such rights, and it would seem to follow, therefore, that respondent is entitled only to those rights accorded by the amendment—that is, a limited pension. Those who were eligible for retirement on the effective date were entitled to the pension they had earned on the effective date and no more, while those who reached the 20-year mark subsequent to the effective date became eligible for retirement on a 50 per cent pension and no more."

The appellants contend that the existing law forms a part of the contract of employment and cite the case of *Byrd* v. *City of Dallas*, 118 Tex. 286, 6 S.W. 2d 738, as

authority for such statement. If the existing law became a part of the contract of employment between the City and appellants, then it is respectfully submitted that the law of reasonable modification announced by this Court and the courts of the State of California became a part of any contract of employment existing between the City and appellants. If the law of reasonable modification became a part of the contract of employment, then any subsequent modification of such contract would be in accordance with the provisions thereof and no constitutional question of impairment of the contract is involved. Since the decision of this Court in the case of *Pennie* v. *Reis*, 132 U.S. 464, the Supreme Court of the State of California has held the law of California to be that pension statutes are subject to reasonable modification (*Kern* v. *City of Long Beach*, 29 Cal. 2d 848). This being the settled law, such became a part of the contract of employment and appellants accepted and continued in the employment of the City in full knowledge of the power of the City to modify the contract. No question has been raised by appellants with respect to the unreasonableness of the modification and, therefore, no Federal question is involved in this attempted appeal.

Appellants attack the judgment of the District Court of Appeal wherein said court held that the electorate of the City of Long Beach intended to modify the pension rights of appellants by withdrawing the right of said appellants to earn an increased pension by reason of longer service in the Police and Fire Departments. In support of their contention they argue that the electorate did not intend to modify the rights of appellants, and they proceed to relate a series of events with respect to Section 187 of the Charter.

The District Court of Appeal and the Supreme Court of the State of California on two occasions ruled against such contentions. The appellants further argue that if the electorate of the City had intended that the provisions of

Section 187 be modified they would have accomplished this fact when they adopted Section 187.5 of the Charter of the City of Long Beach and placed all employees under the State Retirement System except certain members of the Police and Fire Departments who had rights under Section 187.

The case of *Palaske* v. *City of Long Beach*, 93 Cal. App. 2d 120, upheld the modification of pension rights and was decided on July 29, 1949. It is submitted that the electorate was well satisfied with the pension rights as determined by said case, and therefore chose not to further legislate with respect to Section 187 at the time of the adoption of said Section 187.5 in November, 1949.

The appellants contend that they accepted and continued in employment in reliance of certain benefits offered by the Charter, which benefits included pension and civil service rights, and therefore the City should not be permitted to amend their pension rights. In other words, even if an employee had only worked a few days at the time the amendment became effective, the City was without power to alter in any respect that portion of the pay which he would receive in the nature of a pension. The appellees submit that any such contention is not supported by the law as announced by this court or the courts of any state. The fallacy is based upon the assumption that the acceptance of employment creates a contract which cannot be altered in any respect. However, appellants overlook the fact that the law of reasonable modification became a part of the contract and therefore any reasonable modification of the contract is not a derogation of the terms of the contract.

The appellants further argue at considerable length that the modification was in violation of certain provisions of the Constitution of the State of California. The appellees submit that this argument was presented to the Appellate Court on two occasions (*Palaske* v. *City of Long Beach*, 93

Cal. App. 2d 120; *Allen* v. *City of Long Beach*, 101 A.C.A. 22), and the ruling of said court on the interpretation of the Constitution of the State of California is binding on this court. (*Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188; *Nickel* v. *Cole*, 256 U.S. 222, 65 L. Ed 900.)

The appellants challenge the holding of the District Court of Appeal to the effect that the group of appellants constituting provisional employees holding under temporary appointments, and who entered into permanent employment subsequent to the repeal of said Section 187, are not entitled to a pension under its provisions. The provisional employees were given temporary employment at a time when no eligible lists existed to fill positions in the Police and Fire Departments of the City of Long Beach. The said provisional employees had not complied with the provisions of the Charter and Civil Service Rules referred to in appellants' Statement as to Jurisdiction herein.

The contract of employment which was entered into between the City of Long Beach and said provisional employees provided by its terms that said contract would expire not later than one hundred fifty (150) days after said temporary appointments were made. At the time said provisional employees qualified for employment under the provisions of the Charter of the City of Long Beach and the Civil Service Rules and Regulations, and were given a permanent contract of employment, Section 187 of the Charter had been repealed, and any rights given under said section had been withdrawn by the City of Long Beach. The contract of employment did not provide that benefits previously offered to appellants would become a part of the permanent contract of employment. The courts of California have held that a provisional employee acquires no vested civil service rights by reason of the temporary appointment. This issue was settled in the case of *Matherly* v. *Allen*, 86 Cal. App. 2d 95. Therefore, the appellees

submit that at the time the appellants entered into a contract of permanent employment with the City of Long Beach Section 187 had been repealed and the pension provisions thereof did not become a part of the contract of employment.

In the case of *Knights of Pythias* v. *Meyer*, 265 U.S. 30, this Court stated at page 32 as follows:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, Leffingwell v. Warren, 2 Black, 599, 603, 17 L. ed. 261, 262; Green v. Neal, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion."

In the case of *Guarantee Trust Co.* v. *Blodgett*, 287 U.S. 509, this Court stated at page 512 as follows:

> "We are not at liberty to disregard the explicit holding of the state court as to the basis of its decision, except for convincing reasons, which here we are unable to find."

And again, at page 513, this Court stated:

> "Since the court below construed the act of 1923, without regard to the act of 1929, as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

In the case of *Burgess* v. *Seligman*, 107 U.S. 20, this Court stated, beginning at page 33:

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens

> that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

In the case of *Phelps* v *Board of Education*, 300 U.S. 319, the position of the appellants was that by virtue of the act at issue, three years of service under contract confer upon an employee a contractual status, indefinite in duration, which the Legislature is powerless to alter.

The State Court held that whereas the statute was in one sense "perhaps contractual," it was in essence dependent on a statute which the Legislature at will might abolish, or whose emoluments it might change. This Court, in affirming the decision of the State Court, stated, beginning at page 322:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the

obligation of which is asserted to be impaired but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employees by boards of education. Unless these views are palpably erroneous we should accept them."

Appellees submit that the questions presented in this appeal have long been so definitely determined that no substantial questions are presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment of the District Court of Appeal, Second Appellate District, State of California, be affirmed.

IRVING M. SMITH,
City Attorney,
Counsel for Appellees.

No. 155

SEP 13 1951

IN THE

District Court of Appeals

SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

ON APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

ALBION R. ALLEN, et al., *Plaintiffs and Appellants,*

vs.

CITY OF LONG BEACH, et al., *Defendants and Appellees.*

LEE R. ADAMS, et al., *Plaintiffs and Appellants,*

vs.

CITY OF LONG BEACH, et al., *Defendants and Appellees.*

MOTION FOR LEAVE TO FILE ANNEXED BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

J. ALBERT WOLL,
JAMES A. GLENN,
HERBERT S. THATCHER,
736 Bowen Building,
Washington, D. C.
Counsel for
American Federation of Labor.

Ransdell Incorporated

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J-11494

IN THE

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the American Federation of Labor, through counsel, and respectfully moves this Court, pursuant to its

Rule 27, Paragraph 9, for leave to file the accompanying brief as Amicus Curiae. The consent of the attorney for the Appellee was requested but was refused.

The following ground supports this Motion:

Affiliated with the American Federation of Labor are approximately fifteen (15) national and international labor organizations whose members are employed by governmental bodies or agencies. In addition to the Federal government, these agencies include many states, counties and municipalities. Many thousands of their employees are members of American Federation of Labor unions. Almost universally, these employees own valuable pension rights accumulated through years of service pursuant to laws enacted by the respective employer governments. All will be affected by this Court's decision in the instant case.

Therefore, the American Federation of Labor as the supreme parent body charged with safeguarding its members' employment rights, submits the supporting brief. The brief contains authority not presented by any of the parties.

Respectfully submitted,

WOLL, GLENN AND THATCHER,
736 Bowen Building,
Washington 5, D. C.
J. ALBERT WOLL,
JAMES A. GLENN,
HERBERT S. THATCHER,
Counsel for the American Federation of Labor.

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

On November 6, 1950, this Court denied Certiorari in *Anglin v. Bender*, 340 U. S. 878, 71 S. Ct. 125. That case is virtually on all fours with the one at bar. It involved the constitutionality of a Georgia statute which purported to reduce the retirement pension payable to the appellee who had performed substantial services as a fireman prior to the adoption of the amendment, but who did not retire until

some seven years later. The Georgia Supreme Court *Bender v. Anglin*, 207 Ga. 108, 60 S. E. 2d 756, held that the amendment was inaffective insofar as it purported to reduce the retirement pension payable to the employees because it contravened the state and federal constitutional provisions aimed at prohibiting the impairment of contractual obligations.

The fireman Bender was employed in 1915 and retired in 1942. The original statute as adopted in 1924 provided for the payment of a retirement pension of $100 per month to firemen who served the requisite period of time. Under the terms of the 1935 amendment, the retirement pension was reduced to $75 per month. There, as in the case at bar, the appellee had submitted to salary deductions which were paid into a fund established for the payment of the pension. In holding that the employee was entitled to recover the difference between the $100 per month as promised by the original statute and the $75 that he had actually been paid, the Georgia Supreme Court at page 760 said:

> "* * * *No amount of judicial theorizing can escape the plain fact that the existence of a law which promises benefits upon retirement or injury constitutes an inducement to accept the position of fireman, thereby incurring the risks and hazards which the very nature of the work imposes.* Nor do we think it can correctly be said that the provision for taxing the salary prevented the portion of the salary covered by the tax from *becoming the property of the fireman. When it was taken and placed in the fund from which the benefits were to be paid, it constituted a contribution by the fireman of a part of the salary which he had earned by his services.*" (Italics ours.)

The court then referred to certain state constitutional provisions which, like those contained in the California

Constitution, prohibit the use of public funds for gratuitous purposes and at the same page continued:

> *"In the present case, the fireman was not eligible, under the law, to retire when the 1395 Amendment was enacted, but he had been a party to the contract since its inception with the approval of the original law of 1924, and by the contribution of a portion of his salary together with his services he had paid a consideration which gave him a vested right that was protected by the Constitutions. Consequently the attempt by the 1935 Amendment to impair that contract was utterly void."* (Italics ours.)

A similar construction has been placed upon the very statutes under consideration in the case at bar by the California Supreme Court in *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 799. At pages 802, 803, the Court said:

> "• • • Since a pension right is 'an integral portion of contemplated compensation,' • • • it cannot be destroyed once it has vested, without impairing a contractual obligation. *Thus the courts of this state • • • have uniformly held that pension laws such as the Long Beach charter provision establish contractual rights.*"
>
> "• • • Accordingly, *we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may not constitutionally do, and therefore the repeal is ineffective as to petitioner.*" (Italics ours.)

In fact, the situation presented in the case at bar is somewhat unique in that the decision of the District Court of Appeal herein is obviously at variance with the ultimate decision of the California Supreme Court (the highest court in that state) in the *Kern* case, wherein it was determined that the repealing statute was ineffective as to the petitioner

Kern, who occupied exactly the same relationship toward the City as do the appellants herein. The fact that the California Supreme Court denied the petition for hearing in the case at bar does not necessarily mean that that court approved of the "propositions of law laid down in such opinion," because the granting of such a petition is purely discretionary. (*People v. Davis*, 147 Cal. 346, 81 Pac. 718; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156, 78 P. 2d 73.) In the last cited case the court observed that the denial of such a petition after a decision by the California District Court of Appeal "is not an affirmative approval by this court of the propositions of law laid down in such opinion."

The true distinction between the contractual obligation which is created by the performance of services in reliance upon a statutory enactment that provides for the payment of stipulated retirement benefits upon the completion of a specific number of years of service, and the non-contractual or gratuitous payments which are ofttimes provided by statute in recognition of past services, was recognized by this court in the case of *Dismuke v. United States*, 297 U. S. 167, 56 S. Ct. Rep. 400, 80 L. Ed. 561. This case arose upon a petition for certiorari to the Circuit Court of Appeals, Fifth Circuit, and the principal question presented was whether or not the Federal District Court had original jurisdiction. The petitioner was a retired government employee, seeking to enforce the payment of certain retirement benefits as provided in the Civil Service Retirement Act. The government argued that the Federal District Court was without jurisdiction because the claim was for a pension, whereas the petitioner contended that his claim came within the terms of the Tucker Act which conferred jurisdiction in cases where the claim was based upon "any contract, express or implied, with the government of the

United States." In holding that the Federal District Court did have jurisdiction to entertain the case and hence that the United States Supreme Court had jurisdiction to entertain the appeal, this Court, speaking through Justice Stone, at page 564 said:

> " * * * The declaration that the annuities are payable from the retirement fund, which, by § 8 of the Act of May 22, 1929, 41 Stat. at L. 614, 618, chap. 195, U. S. C. A. title 5, § 719, is 'appropriated for the payment of annuities,' amounts to no more than a direction that they shall be charged on the books of the Treasury to the appropriation made for their payment. It does not impair or restrict the obligation to pay.
>
> "The Tucker Act declares that it shall not be construed as giving jurisdiction of 'claims for pensions' or 'of cases brought to recover fees, salary or compensation for services of officers of the United States.' The government argues that the present suit must be either the one or the other. It does not press the contention that the annuities are 'salary or compensation,' which we think without merit, see Retirement Bd. v. McGovern, 316 Pa. 161, 174 A. 400, but it insists that the suit is brought to recover a pension. The proviso withholding jurisdiction of suits on claims for pensions was a part of the original Tucker Act, which became law March 3, 1887, long before the enactment of the Retirement Act of May 22, 1920, and at a time when the term 'pensions' commonly referred to the gratuities paid by the government in recognition of past services in the Army or Navy. *The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by employees, in recognition both of their past services and of services to be performed.*
>
> "The Act itself, in contradistinction to the nu-

merous pension acts, see U. S. C. A. title 38, does not refer to the annuities as pensions, and expressly excludes from the service to be counted, in determining the class to which the annuitant is to be assigned, the period for which the employee 'elects to receive a pension under any law . . . ' § 3, Act of May 22, 1920, 41 Stat. at L. 615, chap. 195, U. S. C. A. title 5, § 707. *We conclude that annuities payable under the Retirement Act are not pensions within the meaning of the Tucker Act and that suits against the government to recover them are within the jurisdiction of district courts,* if not precluded, as the court below held they are, by the administrative provisions of the Retirement Act." (Italics ours.)

Essentially the same distinction was recognized by the California Supreme Court in *Gibson v. City of San Diego,* 25 Cal. 2d 930, 156 P. 2d 737, at page 937, viz.:

"As observed by this court in O'Dea v. Cook (1917), 176 Cal. 659, 661 [169 P. 366], 'A pension such as this law contemplates is not a gratuity or a gift. . . . [W]here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.' And in Klench v. Pension Fund Commissioners (1926), supra, 79 Cal. App. 171, 185, the court said: '*A pension is a gratuity only where it is granted for services previously rendered which, at the time they were rendered, gave rise to no legal obligations.* [Citations] . . . *And herein lies an important distinction between pension laws which, like those we now have before us, provide for pensions for services performed for the government or disabilities occurring while rendering such services after the law has been passed, and a pension system designed to care for or reward soldiers for disabilities suffered or services rendered in the past. . . .* ' " (Italics ours.)

The fact that the term "pension" is used to describe the benefits payable does not of course mitigate against the true nature of the payment. The term has been variously used to define any periodical payment that is made by the government to retired officers or employees and to the widows and children of men killed in government service. (See New Twentieth Century Dictionary.)

Speaking of a similarly worded statute, the Pennsylvania Court in *Kelly v. Loveland*, 141 Pa. Super. 455, 15 Atl. 411, at page 415 said:

> " • • • This ordinance, in spite of the use of the misleading term 'pension,' throughout its provisions in legal contemplation creates what might more accurately be denominated a retirement fund. The 'pension' payable to eligible employees is not a mere gratuity or bounty, but is earned compensation arising out of a contract right."

Similarly in *Bausewine v. City of Philadelphia Police Pension Fund Assn.*, 237 Pa. 267, 10 Atl. 2d 446, the court at page 447 said:

> " • • • Regardless of the fact that the Association designated its fund as a 'pension' fund, and the payments upon retirement to those entitled thereto 'pensions,' there can be no doubt that the fund is a retirement fund and the payments retirement pay; as such they represent in part adjusted compensation."

To the same effect see:

Quam v. City of Fargo (1950 N. D.) 43 N. W. 2d 292, 296;

Mattson v. Flynn, 216 Minn. 354, 13 N. W. 2d 11, 15;

Cobbs v. Home Ins. Co., 18 Ala. App. 206, 91 So. 627, 629.

In the last cited case the court, in referring to a statute which used the term "pension" said: "The compensation thus paid, by whatever name called, is not a gratuity, but

a part of the stipulated consideration, for which they contracted and served."

The foregoing decisions would seem to apply with equal force to the case at bar. Here the appellants were induced to enter into and continue their employment with the appellee as a result of the specific benefits, including pension rights, offered by the charter. They refrained from accepting other higher paying employment opportunities because of their rights to earn and receive the specific retirement benefits. Throughout the major portion of their service, various deductions were made from their salaries upon the understanding that the money so withheld would be used to pay the specific benefits promised. These controlling facts clearly distinguish the instant case from the authorities dealing with gratuities or bounties, such as were before this court in *Frisbie v. United States*, 157 U. S. 160, 39 L. Ed. 657.

A substantial federal question has been posed by the case at bar. The rights of thousands of governmental employees depend upon this Court's decision herein. Moreover, the power of governmental bodies to attract and retain efficient, experienced personnel by protected retirement benefits will be directly affected by the outcome in the instant case.

For these reasons, the American Federation of Labor respectfully requests this Court to exercise its power to entertain the instant appeal.

Respectfully submitted,

J. Albert Woll,
James A. Glenn,
Herbert S. Thatcher,
736 Bowen Building,
Washington, D. C.
Counsel for
American Federation of Labor.

No. 155. ALLEN ET AL. *v.* CITY OF LONG BEACH ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion for leave to file brief of American Federation of Labor is denied. The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Herbert S. Thatcher* for appellants. *Irving M. Smith* for appellees. Reported below: 101 Cal. App. 2d 15, 224 P. 2d 792.